PP

v.

CHOW KAM MENG

HIGH COURT MALAYA, JOHOR BHARU
ABDUL WAHAB PATAIL J
[CRIMINAL TRIAL NO: 45-35-2000]
17 JULY 2001

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Trafficking in dangerous drugs - Whether drugs properly identified by chemist - How analysis of drugs to be conducted - Dangerous Drugs Act 1952 s. 37(j)*

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Trafficking in dangerous drugs - Drugs discovered in back seat of car - Whether possession established - Whether other occupants had access to drugs - Dangerous Drugs Act 1952 ss 37(d), (da), (h)*

EVIDENCE: *Hearsay - Maker of statement not called as witness - Whether presence of witness could not be procured without an amount of delay or expense - Evidence Act 1950 s. 32*

EVIDENCE: *Presumption - Presumption of adverse inference - Failure to produce police report - Whether presumption of adverse inference should have invoked - Evidence Act 1950 ss. 114(g), 157*

The accused was charged for trafficking in dangerous drugs (cannabis), an offence punishable under s. 39B of the Dangerous Drugs Act 1952 (the DDA). According to SP4, one Inspector Mohd Zulkifli, he had led an ambush party at the Senai Toll Plaza, when the accused driving a Perodua Kancil bearing registration number MAN 7233 with one Woon Kee Seng in the passenger seat were stopped. Upon SP4 approaching and introducing himself as the police, the accused and Woon tried to run away but were arrested by members of the ambush party. Upon inspection of the car, the arresting officer found a total of 20 clear plastic wrapped packages containing compressed plant material which were later found to be cannabis as defined in s. 2 of the DDA.

Held:

[1] The term 'first information report' is used in relation to the first police report filed alleging the commission of an offence, and if there is no previous police report, the arrest report is in fact the first information report. Both reports are entries in a public or official record and made by a public servant in the performance of his duty and if it states a fact in issue or a relevant fact, is itself a relevant fact under s. 35 of the Evidence Act.

[1a] If the person making the report is called as a witness and he is challenged that his testimony is not truthful, he may be asked to produce the police report that he had lodged as a previous statement under s. 157 of the Evidence Act.

[1b] The facts of the case disclosed that when it was put to the arresting officer that his police report if produced would damage his testimony, he had in fact agreed that it was so. Since the police report had not been produced, the inference was that the failure to tender the report raises an adverse presumption that if produced would contradict him.

[2] Section 37(j) clearly requires not 10% of the weight of the plant material in each of the slabs wrapped in plastic to be used as samples, but to 10% of the number of slabs. In this case, the chemist had analysed 32 representative samples from each of the 20 slabs - thus analysing 10 times more than he is required to do if 37(j) is relied upon. The facts however disclosed that there were no doubts in respect of the identification of the dangerous drugs by the chemist.

[3] In the absence of any direct evidence as to trafficking by the accused, the prosecution relies upon s. 37(da) of the DDA which provides that 'any person who is found in possession of … shall be presumed … to be trafficking in the said drug.' That being the case, the prosecution must prove possession by physical evidence and from inferences that may be drawn from such evidence.

[3a] The facts disclosed that there were occupants (including the accused) in the car. There were therefore three possibilities, namely (a) that both had possession of the drugs; (b) that Woon had possession of the drugs; or (c) that the accused had possession of the drugs. The impeachment of Woon leaves at large the possibility that the person who had possession of the drugs was Woon himself.

[4] The fact that the accused was the driver of the car in which the three bags containing the drugs were found on the back seat cannot lead to the conclusion that the accused was found in possession of drugs since a car is not an 'anything whatsoever containing'.

[4a] There is no presumption of custody from the mere fact of driving the car. Even if it assumed for the sake of argument that the accused knew the nature of the drugs, it would be wrong to infer that the accused had custody of the drugs simply by allowing Woon to bring it with him into the car and had not left the drugs with the accused. In the circumstances, the failure to adduce evidence to eliminate the possibility that Woon was in possession or had custody or control is a fatal flaw in the prosecution's case.

[5] It is a general and fundamental rule of evidence that the best evidence available must be adduced. If less than the best evidence is to be used, for example if s. 32 of the Evidence Act is resorted to, the onus is upon the party that seeks to adduce it to satisfy the court that the circumstances fall strictly within the section.

[5a] The facts of the case disclosed that the car driven by the accused was actually owned by one Baharuddin Abdul Karim who was not called as a witness. According to the facts of the case, there was no evidence of any efforts to conclude that the witness could not be found - neither was there any evidence of any effort to maintain contact with the witness for the purposes of the trial.

[5b] Furthermore, as this trial involved a possible death penalty, more serious efforts were warranted, resulting in the finding that this was not a case where the witnesses (Baharuddin Abdul Karim) could not be found or that his presence could not be procured without an unreasonable amount of delay of expense.

[Accused acquitted.]

Case(s) referred to:
Choo Yoke Choy v. PP [1992] 4 CLJ 1791; [1992] 1 CLJ (Rep) 43 ***(refd)***
Leong Bon Huat v. Pendakwa Raya [1993] 3 CLJ 603 ***(foll)***
Leow Nghee Lim v. R [1956] MLJ 28 ***(foll)***
Loo Kia Meng v. Pendakwa Raya [2000] 3 CLJ 653 ***(not foll)***
Muhammad Hassan v. PP [1998] 2 CLJ 170 ***(foll)***
PA Anselam v. PP [1941] MLJ 157 ***(refd)***
PP v. Mohamed Fairus Omar [1998] 5 MLJ 729 ***(refd)***
R v. Abbott [1955] 2 All ER 899 ***(refd)***
Roslim Harun v. PP [1994] 2 CLJ 486 ***(refd)***
Shamsuddin Hassan & Anor v. PP [1991] 3 CLJ 2414; [1991] 1 CLJ (Rep) 428 ***(refd)***
Syed Ali Syed Abdul Hamid & Anor v. PP [1982] 1 MLJ 132 ***(refd)***
Wong Thin Yit v. Mohamed Ali [1971] 2 MLJ 175 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 112, 180(ii)
Dangerous Drugs Act 1952, ss. 2, 37(d), (da), (h), (j), 39B
Evidence Act 1950, ss. 32(1)(i), 35, 114(g), 157,

For the prosecution - Puan Juraidah DPP
For the accused - Abdul Hamid Menon; M/s RK Menon & Co

Reported by Mariette Peters-Goh

JUDGMENT

Abdul Wahab Patail J:

The Facts

The accused Chow Kam Meng (the accused) is charged before this court that on or about 14 June 1999 he trafficked in 19,256 grams of cannabis, an offence punishable under s. 39B of the Dangerous Drugs Act 1952.

The arresting officer, Inspector Mohd. Zulkifli Daud (SP4) told the court that he had led an ambush party at the Senai Toll Plaza at about 12.30 am on 14 June 1999. It would appear they waited nearly all day for it is only at 6.30 pm that evening that he saw a Perodua Kancil bearing registration number MAN 7233 arrive. In it were the accused who was the driver and one Woon Kee Seng in the passenger seat. Upon SP4 approaching and introducing himself as the police, the accused and Woon Kee Seng tried to run away but were successfully arrested by members of the ambush party. Upon inspection of the car in front of the accused and Woon Kee Seng, the arresting officer noticed the aroma of cannabis in the car. He found three bags in which were found a total of 20 clear plastic wrapped packages containing compressed plant material suspected to be cannabis.

The arresting officer brought the accused, Woon Kee Seng and the exhibits in the Perodua Kancil MAN 7233 to the narcotics division of the Johore Police contingent headquarters, where he lodged a police report with regard to the incident. The exhibits suspected to be cannabis were sent to the chemist for analysis. The chemist found that the exhibits contained 19,256 grams of cannabis as defined in s. 2 of the Dangerous Drugs Act 1952.

Application Of S. 114(g) Evidence Act

In his submission of no case to answer counsel argued that s. 114(g) of the Evidence Act 1950 should be applied in respect of the non-production of the police report filed by the arresting officer, which is a contemporaneous record of the incident. The prosecution submitted it was an arrest report, and not a first information report.

There is to my mind no difference between an arrest report and a first information report when the issue is whether police report lodged by the witness who is before the court is being cross-examined as to whether his testimony before the court accords with a previous statement he has made. The term ‘first information report’ was used in relation to the first police report filed alleging the commission of an offence, and if there is no previous police report, the arrest report is in fact the first information report. Whether it is a first information report or an arrest report is immaterial since in any case both reports are entries in a public or official record and made by a public servant

in the performance of his duty, and if it states a fact in issue or a relevant fact, is itself a relevant fact under s. 35 of the Evidence Act 1950. A first information report is of little value as evidence of the truth of its contents: see *Wong Thin Yit v. Mohamed Ali* [1971] 2 MLJ 175 FC; *PA Anselam v. PP* [1941] MLJ 157 HC. More to the point then is whether his police report contradicted his oral testimony in court. If the person making the report is called as a witness, and he is challenged that his testimony is not truthful, he may be asked to produce the police report that he had lodged as a previous statement under s. 157 of the Evidence Act 1950. In this case it was put to the arresting officer that his police report if produced would damage his testimony, and he had in fact agreed that it was so. Counsel had therefore not proceeded to seek production of the police report.

In re-examination he was asked by the prosecution to explain:

> Kamu kata setuju sekiranya laporan polis dikemukakan ia akan menjejaskan keterangan kamu? Cuba jelaskan.

He was unable to do so even though the court repeated the question three times. Finally when asked again "Sekiranya laporan polis dikemukakan bolehkah ia menjejaskan keterangan kamu?" he replied that the production of the report would not damage his testimony, explaining lamely that he did not understand the question earlier in cross examination. The prosecution had succeeded in its re-examination only to present a contradiction by its key witness against his own earlier reply in cross examination, but did not proceed to settle the issue of which reply is true when the prosecution failed to produce the police report that that witness himself had lodged. In the circumstances it is not only impossible to say that the witness had fully restored his credibility but it is also fair to allow it to be inferred that the failure to tender the report raises an adverse presumption that if it was produced it would contradict him.

Section 37(j) Of The Dangerous Drugs Act 1952

In this case the drugs were contained in 20 plastic packages in three bags. It was submitted that the Court of Appeal in *Loo Kia Meng v. PP* [2000] 3 CLJ 653 has held that the prosecution must adduce evidence whether 10% of the total weight of the drugs was actually used as sample or not. The accused in that case was carrying two packages of cannabis weighing 4,105 grams.

Section 37(j) of the Dangerous Drugs Act provides:

> When any substance suspected of being a dangerous drug has been seized and such substance is contained in a number of receptacles, it shall be sufficient to analyse samples of the contents of a number not less than ten per centum of such receptacles and if such analysis establishes that such samples are all of the same nature and description, it shall be presumed, until the contrary is proved, that the contents of all the receptacles were of the same nature and

> description as the samples so analysed and if such analysis establishes that such samples consist of or contain a dangerous drug, it shall be presumed, until the contrary is proved, that the contents of all the receptacles consist of or contain the same proportion of such drug.

The subsection refers to cases where "such substance is contained in a number of receptacles". In such a case, it provides that it shall be sufficient to analyse samples of the contents "of a number not less than ten per centum of such receptacles". The use of the term number rather than amount clearly shows that "number" refers to the number of receptacles rather than to the substance, where the correct phrase would be "amount not less than ten per centum of such substance".

Section 37(j) clearly requires not 10% of the weight of the plant material in each of the slabs wrapped in plastic to be used up as samples, but to 10% of the number of slabs. In other words, if the presumption under s. 37(j) is relied upon in this case, it would be sufficient to have analysed samples from two of the slabs. In this case the chemist had analysed 32 representative samples from each of the 20 slabs, thus analysing ten times more than he is required to do if s. 37(j) is relied upon. To give s. 37(j) the interpretation that it requires 10% of the substance to be used up as sample in analysis would make the section not the presumption that it is intended to be but a burden and involving a testing practice not that is not necessary for the purpose of identifying the substance involved.

The Court of Appeal in the above-mentioned case relied upon *Leong Bon Huat v. Pendakwa Raya* [1993] 3 CLJ 603. The attention of the Court of Appeal does not appear to have been drawn to *Roslim Harun v. PP* [1994] 2 CLJ 486 SC, where the accused was found to be trafficking in 1.5 kilograms of cannabis comprised in 2,700 rolls. The Supreme Court distinguished *Leong Bon Huat v. PP* on the basis of the infirmities of the evidence of the chemist, and which the Supreme Court set out as follows from the latter decision:

> It will be seen that he [the chemist] made no mention of the results of his physical examination; for example, he did not say that the plant material was all of the same type and physical features as that of cannabis, nor did he say what were the results of his microscopic examination. Did he notice any resin in the plant material? If so, in what quantity was it present? Nor did he tell the court as to what were the tests he conducted using chemical methods; for example, did he resort to the Duquenois Levine test and/or the thin layer chromatography test? If so, what were the results of those tests?

The Supreme Court did not find it necessary that 10% of the total weight of cannabis has to be used up as sample. I would conclude that in the light of the Supreme Court decision in *Roslim Harun v. PP*, the Court of Appeal decision in *Loo Kia Meng v. Pendakwa Raya* is not good authority.

It is readily seen that the chemist in this case is a chemist of 16 years experience, Ahmad Nazri Husain (SP3) had weighed the exhibits and found the net weight of the compressed plant material to be a total of 19,256 grams. He told the court he had conducted a visual examination and then a microscopic examination upon all of the plant material which was first loosened. The loose material in the plastic bags into which he sealed the balance of the plant material support his statement. He told the court he found the plant material to contain characteristics of cannabis and found the presence of resin attached to the plant material. He had elaborated that he did not find any foreign material and that he found the plant material to be comprised of the same plant genus. Then from 32 random samples he conducted the Duquenois Levine color test. He found that the test returned a positive test. That other material could result in a similar positive colour result on the Duquenois Levine test is irrelevant since the nature of the testing procedure is such that it is a procedure of narrowing down the possibilities. If the visual examination shows it not likely to be cannabis, such as lallang, it is not necessary to proceed to the tedium of a microscopic examination. After a positive visual examination, the chemist could conceivably proceed to the colour test but must proceed to a microscopic test in order to affirm positively under a microscopic examination of all of the plant material that it contains the plant feature such as hairs and resin of cannabis plant, but also that all of the plant material are of the same genus under minute examination, such that minute non-cannabis are not included such as might unfairly increase the total weight of offending material. If satisfied with the microscopic test that the plant material is all cannabis, then he proceeds to the colour test. A colour test is not conclusive, but justifies proceeding to the thin layer chromatography test (TLC) for 32 samples from each slab to identify the presence of tetrahydro-cannabinoid (THC) and cannabinol (CDN), which are the active ingredients of cannabis. The combination of the four tests is material to confirm with a high degree of certainty, because lallang impregnated with tetrahydro-cannabinoid (THC) and cannabinol (CDN) could conceivably return a positive TLC and Duquenois test, but would clearly fail the microscopic examination, or even visual examination. In the hands of experienced persons, I would be satisfied that, if performed systematically through these four tests would result in identification with a very high degree of certainty.

Following *Roslim Harun v. PP* I would hold therefore there is no doubt raised in respect of the identification of the dangerous drug by the chemist, and would therefore accept his findings.

Whether Accused Had Possession Or Custody Or Control Of The Drugs In The Car

In the absence of any direct evidence as to trafficking by the accused in the said dangerous drug, the prosecution clearly relies upon s. 37(da) of the Dangerous Drugs Act 1952 which provides that:

In all proceedings under this Act or any regulation made thereunder

(da) any person who is found in possession of:

(vi) 200 grammes or more in weight of cannabis otherwise than in accordance with the authority of this Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug.

That being the case, the prosecution cannot rely on s. 37(d) of the said Act to prove possession: see *Muhammad Hassan v. PP* [1998] 2 CLJ 170 FC which held that "... The trial judge had therefore erred in law by using the presumption of possession under s. 37(d) of the Act to invoke the presumption of trafficking under s. 37(da) thereof." The prosecution must therefore prove possession by physical evidence and from inferences that may be drawn from such evidence.

According to the arresting officer, he found three bags on the back seat of the car and that the bags occupied the left side. Det L/Kpl Mohd. Arif Alias (SP6) told the court the bags occupied most of the back seat. Be that as it may, it is clear that the drugs were not in any concealed compartment specially made for the purpose as to raise the operation of s. 37(h) of the Dangerous Drugs Act 1952 which would deem the accused, as the person in charge of the car, to have knowledge it has been so concealed.

The arresting officer and SP6 had both given evidence that they could smell the aroma of cannabis from the car when the door was opened. These are officers in the narcotics division of the police force and I would accept that they have the necessary experience and therefore knowledge of what is the aroma of cannabis. Even though the bags had to be opened before the plastic wrapped slabs could be seen the accused and Woon Kee Seng would at least be aware that there is an unusual smell in the car emanating from the bags. However even assuming that they must have known what is in the bags as evidenced by the fact they both tried to run away when approached by the police, the issue before the court in a trafficking charge relying upon s. 37(da) of the Dangerous Drugs Act 1952 is whether the accused had possession of the drugs in the bag.

Now, it is clear there were two occupants in the car: the accused and Woon Kee Seng. There are therefore three possibilities: (a) that both had possession

of the drugs, (b) that Woon Kee Seng had possession of the drugs or (c) that the accused had possession of the drugs. The impeachment of Woon Kee Seng results in there being no evidence of any value as to who in fact had possession of the drugs, and leaving at large the possibility that the person who had possession of the drugs was Woon Kee Seng himself, and who in fact is being held in Muar Prison under LLPK for drug trafficking.

In *R v. Abbott* [1955] 2 All ER 899 Lord Goddard held:

> ... if two people are jointly indicted for the commission of a crime and the evidence does not point to one rather than the other, and there is no evidence that they were acting in concert, the jury ought to return a verdict of not guilty against both because the prosecution have not proved the case. If, in those circumstances, it were left to the defendants to get out of it if they could, that would put the onus on the defendants to prove themselves not guilty. Finemore J remembers a case in which two sisters were indicted for murder, and there was evidence that they had both been in the room at the time the murder of the boy was committed; but the prosecution could not show that sister A had committed the offence or that sister B had committed the offence. Very likely one or the other must have committed it, but there was no evidence which, and although it is unfortunate that a guilty party cannot be brought to justice, it is far more important that there should not be a miscarriage of justice and that the law should be maintained that the prosecution should prove its case ...

The above was cited with approval in *Shamsuddin Hassan & Anor v. PP* [1991] 3 CLJ 2414 SC, where it was not known whether it was the accused or his wife who threw the package containing drugs out of the car while it was chased by the police and driven by the accused. See also *Choo Yoke Choy v. PP* [1992] 4 CLJ 1791. In *PP v. Mohamad Fairus Omar* [1998] 5 MLJ 729 KC Vohrah J (as he then was) found that the accused must have known of the presence of cannabis because the room smelt of it. He put up a struggle at the time of his arrest but such behaviour could have merely showed that he knew of the presence of cannabis or perhaps of the heroin but the evidence fell short of showing the nexus between him and the drugs found in the room. He was not the only occupant of the room. His Thai wife shared the same room. That his Thai wife probably had a nexus to the drugs could not be ruled out. Her statement did not implicate the accused with the drugs found in the room. It was held that assuming there could be an inference that either the accused or his Thai wife had custody or control of the drugs, that inference was not sufficient to make out a case against the accused.

I have addressed the issues above from the standpoint of the trafficking charge and reliance upon s. 37(da) which requires physical evidence of possession.

I have also considered the possibility that the evidence discloses the offence of possession only. In the absence of physical evidence of possession, reliance must be had to s. 37(d) of the Dangerous Drugs Act 1952 which provides:

> any person who is found to have had in custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug.

It has been held that a car is not within the meaning of "anything whatsoever containing ..." : see Syed *Ali Syed Abdul Hamid & Anor v. PP* [1982] 1 MLJ 132 FC. Thus the fact that the accused was the driver of the car in which the three bags containing the drugs were found on the back seat cannot lead to the application of s. 37(d) to the drugs in the bags in the car since a car is not an ".. anything whatsoever containing...". The issue then is whether the accused had custody or control of the bags containing the dangerous drug simply because he was the driver of the car. It was argued for the prosecution that the driver of the car has custody or control because he had the power to refuse to take or carry the passenger if the passenger was carrying drugs. The point however has been made succinctly in *Leow Nghee Lim v. R* [1956] MLJ 28, that there is no presumption of custody, and the presumption of possession arises from custody. If Woon Kee Seng brought the bags into the car, as the prosecution argument supposes, and even if it assumed for the sake of argument that the accused knew the nature of the drugs, it would be wrong to infer that the accused had custody of the drugs simply by allowing Woon Kee Seng to bring it with him into the car, while the latter remains in the car and has not left the drugs with the accused.

The conclusion as who has custody or control of the drugs found in the car driven by the accused and in which another is a passenger, without any further evidence, must remain the same as in *PP v. Mohamad Fairus Omar* cited above.

In all the circumstances, the failure to adduce evidence to eliminate the possibility that Woon Kee Seng was in possession, or had custody or control, is a fatal flaw in the prosecution case.

Admission Of S. 112 CPC Statement Under S. 32 Evidence Act 1950

Even if there is evidence that the drugs were in the car when Woon Kee Seng entered the car driven by the accused, there is the complication of the fact that the car is not owned by the accused but by one Baharuddin Abdul Karim. There is no evidence when, how and on what terms the car was placed in the hands of the accused because the said Baharuddin Abdul Karim was not found so as to be brought to court to give evidence. Since the accused is not

the sole user of the car, it is possible that the drugs may have been in the car without the knowledge of the accused or that even if he knew the bags were in the car he did not know the nature of the contents in the bags. The prosecution sought to remedy this gap in evidence by seeking to tender into evidence a police statement recorded from him under s. 112 of the CPC through s. 32 of the Evidence Act 1950.

It is a general and fundamental rule of evidence that the best evidence available must be adduced. If less than the best evidence is to be used, for example if s. 32 of the Evidence Act is resorted to, the onus is upon the party that seeks to adduce it to satisfy the court that the circumstances fall strictly within the section. The standard for such proof must also be the ordinary standard applicable to the party. There is no question that the statement recorded by the investigating officer is made under s. 112 of the Criminal Procedure Code and therefore falls within s. 32(1)(i). At issue in this case is whether the witness concerned falls within one of the categories within s. 32(1) Evidence Act itself. The relevant issue is whether he is a person a) who cannot be found or b) whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court to be unreasonable.

The investigating officer told the court he directed on 29 June 2001 Det Kpl Mohamed Kasim Mohd Zain (SP11) to locate the witness. Now, this trial commenced on 4 July 2001. SP11 went to Kuala Lumpur on 30 June 2001. He was told at the work address that the witness had ceased to work there since sometime at the end of 1999. SP11 went to the residential address of the witness at 8.00pm that evening and waited 1 1/2 hours. He told the court that next he went to A2-33 Taman Nirwana. The address the investigating officer gave the court was A2-333. The address from the National Registration Department is A2-3-3. SP11 told the court that he found the house he went to was not occupied (tiada penghuni). But he also stated that the door was locked. SP11 had proceeded again to the house the next day at 10.00am. Again he found it locked. He told the court that he asked a person he found nearby "Saya tanya pada beliau samada dia kenal penghuni rumah itu." The answer he received was that he did not know the person. More to the point for a start would be to ask if he knew the house was occupied. At the end of his examination he told the DPP that "Rumah itu juga - keadaan nya macam berpenghuni". He went to houses to the left and to the right of the house, and found those houses to be locked also. Why he did not go to those houses the first night was not explained, and the fact in the morning at 10.00am those houses were also locked seem to leave the probable likelihood the occupiers were away rather than those houses were not occupied. While it is true that SP11 did not find the witness, the evidence of his efforts does not allow me to conclude that the witness concerned cannot be found.

The alternative ground relied upon is that his attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court to be unreasonable. That his attendance cannot be procured refers to the bringing of the witness to the court and presupposes (a) knowledge where the witness may be so as to decide whether the time and expense needed to bring him is unreasonable in the circumstances, or (b) knowing with some certainty that he is not at the address he is previously known to be, and that despite reasonable efforts to keep in contact with him at least since a decision to prosecute has been made, he has disappeared from such address, and there is evidence that to find him would require expense and time which would be unreasonable in the circumstances of the case. In the first alternative there is no evidence where the witness might be. In the second alternative there is no evidence of any effort to maintain contact with the witness for the purpose of trial. Bearing in mind that even if the prosecution may not call him, a witness must still be offered to the defence, and in the meantime an accused is being detained in custody pending trial, there is every reason to ensure that contact is maintained with the relevant witnesses. Efforts in this case to trace the witness was made only when presumably the summons could not be served, and consisted of checking with the National Registration Department, the Immigration Department and sending SP11 to Kuala Lumpur to the work and the residential addresses of the witness. Even assuming the address A2-3-3 is the same as A2-333 and A2-33 refer to the same house, the evidence of SP11 did not confirm the house was no longer occupied by the witness. The evidence adduced only shows that the witness was not there when SP11 went to the house, at times when the neighbors were also not at home. SP11 did not say the house was abandoned.

That he cannot be found or his attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court to be unreasonable, places a further and important qualification. Not much effort to find and procure attendance is warranted in a minor case. In a trial involving a possible death penalty, a more serious effort is warranted. The evidence placed before the court does not warrant a finding in this trial involving the death penalty that the witness Baharuddin Abdul Karim cannot be found or that his presence cannot be procured without an unreasonable amount of delay or expense.

I find therefore, at the conclusion of the case for the prosecution, that these flaws mean the prosecution has not made out a *prima facie* case against the accused, and in accordance with s. 180(ii) of the Criminal Procedure Code, I have recorded an order of acquittal.